

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33644

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| NCO FINANCIAL SYSTEM, INC., |) | 2008 Unpublished Opinion No. 461 |
| |) | |
| Plaintiff-Counterdefendant- |) | Filed: May 13, 2008 |
| Respondent, |) | |
| |) | Stephen W. Kenyon, Clerk |
| v. |) | |
| |) | THIS IS AN UNPUBLISHED |
| PETER HOOVER, |) | OPINION AND SHALL NOT |
| |) | BE CITED AS AUTHORITY |
| Defendant-Counterclaimant- |) | |
| Appellant. |) | |
| |) | |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Valley County. Hon. G. David Carey, District Judge.

Summary judgment for plaintiff, affirmed.

Peter Hoover, Basalt, pro se appellant.

Howell & Vail, LLP, Boise, for respondent.

LANSING, Judge

Peter Hoover appeals from the district court's grant of summary judgment to NCO Financial System, Inc. ("NCO") in this action for the collection of unpaid medical bills. We affirm.

I.

BACKGROUND

NCO, as the assignee of medical service providers, filed a collection action against Hoover seeking recovery on unpaid medical bills for services rendered to Hoover, his now-deceased wife, and their minor child. After Hoover answered, the district court entered a scheduling order requiring that NCO disclose its trial witnesses by June 26, 2006. NCO served its disclosure two days late. Hoover moved to dismiss the action as a sanction for NCO's noncompliance with the scheduling order. The district court denied the motion.

NCO filed a motion for summary judgment with affidavits of the custodians of records of the providers in support. Attached to the affidavits were pertinent hospital billing records. At a hearing on the motion, Hoover contended that NCO had violated the physician-patient privilege by providing the records. Hoover also complained that NCO improperly revealed private information, including social security numbers, in filing the records in a public forum. The district court did not find any merit in Hoover's complaints and considered the affidavits in granting summary judgment to NCO.

Hoover appeals.

II.

ANALYSIS

This Court has experienced some difficulty discerning the substance of Hoover's issues and arguments on appeal. The argument portion of his appellant's brief is not organized according to his listed issues, contains little citation to the record showing where his issues were raised and ruled upon, and contains no citation to case law pertinent to the issues raised. Giving Hoover the benefit of the doubt, he raises three cognizable issues¹ in this appeal which we address in turn.

A. Denial of Motion to Dismiss

The district court entered a scheduling order providing that the parties were to disclose the names and addresses of their trial witnesses by June 26, 2006. No trial date had been set at this time. When NCO served its witness list two days late, Hoover moved to dismiss the complaint as a sanction for NCO's noncompliance with the order. The district court denied the motion, holding that it would not dismiss the case when the disclosure was only a few days late and Hoover had suffered no prejudice. Hoover claims error. We find none.

The imposition of sanctions for violation of a pretrial scheduling order is committed to the sound discretion of the trial court. *Priest v. Landon*, 135 Idaho 898, 900, 26 P.3d 1235, 1237 (Ct. App. 2001). The drastic remedy of dismissal of a cause of action as a sanction for noncompliance with pretrial orders or discovery orders is rarely warranted absent actual,

¹ Hoover's first listed issue is "To tell the truth the whole truth and nothing but the truth so help me God under Idaho Statute 18-5402 Oath." This states no issue that can be addressed by this Court.

demonstrated prejudice to the opposing party. *Aho v. Idaho Transp. Dep't of State*, 145 Idaho 192, 195, 177 P.3d 406, 409 (Ct. App. 2008); *Adams v. Reed*, 138 Idaho 36, 39, 57 P.3d 505, 508 (Ct. App. 2002). Where late disclosure of a trial witness is involved, to establish prejudice the moving party must ordinarily show that the late disclosure hampered its ability to meet the evidence at trial. *State v. Allen*, 145 Idaho 183, 186, 177 P.3d 397, 400 (Ct. App. 2008).

Here, Hoover has failed to identify any prejudice he suffered from NCO's untimely witness disclosure, much less trial prejudice. Indeed, there was no trial as this case was decided on summary judgment. The district court did not abuse its discretion by denying Hoover's motion to dismiss.²

B. Physician-Patient Privilege

Hoover next claims that the billing records were submitted by NCO in violation of the physician-patient privilege, I.R.E. 503. The privilege extends only to confidential communications (i.e., communications not intended to be disclosed to third persons) made for the purpose of diagnosis or treatment of a physical, mental or emotional condition. I.R.E. 503(a)(4), 503(b)(1).³ The billing records in question here contain no confidential

² Hoover also appears to argue that if a person is not disclosed as a trial witness, a party cannot submit an affidavit from that person in pretrial proceedings. Hoover submits no authority for this novel proposition of law and we reject it. In addition, Hoover argues that NCO's affidavits were defective, and improperly considered by the district court, because they were not signed by the affiants under oath. This is not so. The affidavits filed with the district court were signed under oath. For some unknown reason, when NCO served Hoover with the affidavits, the affidavits they provided to him personally were unsigned copies. This anomaly, however, provides no relief for Hoover.

³ Rules 503(a)(4) and 503(b)(1) provide:

(a) Definitions. As used in this rule:

....

(4) Confidential Communication. A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rules of Privilege.

(1) Civil Action. A patient has a privilege in a civil action to refuse to disclose and to prevent any other person from disclosing confidential

communications but instead identify medical tests and treatments provided and the charges for those. Hoover's claim of error is without merit.⁴

C. Motion to Augment the Record on Appeal

Finally, Hoover argues that the district court erred by denying, in part, his motion for additions, corrections or deletions to the clerk's record and transcripts on appeal. *See generally* Idaho Appellate Rules 29(a), 30 & 31. Hoover apparently interpreted these rules as an invitation to strike evidence that he viewed as improperly admitted and to delete from NCO's affidavits statements that he contended were not true or were improperly presented. The district court was unconvinced and denied Hoover's requests. We agree with the district court's determination. The purpose of these appellate rules is to allow a party, whether the appellant or the respondent, to request that the clerk's record on appeal include additional court documents not requested in the notice of appeal, to delete a prior request for a transcript or record because its inclusion is not necessary to the determination of an issue on appeal, or to correct inaccuracies in the transcription of a hearing or proceeding. The rules are not a mechanism to alter the content of documents in the district court file or to assert objections to evidence not raised in the trial proceedings.

Hoover also asserts because NCO did not appear at the hearing on his motion, the district court was required, as a matter of law, to grant his requests. This is not so. Trial courts are not

communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

⁴ Hoover also asserts that NCO violated United States District Court Rule 5.5 in the submission of the billing records, which included certain personal information about Hoover, his wife, and their child. That federal rule does not apply because this is an Idaho state court action, not a federal court action. Moreover, if Hoover was concerned with the public disclosure of private information contained in the billing records, he could have filed a motion with the district court to have the private information redacted or for the records to be submitted under seal, thus limiting the public's access to the documents. He did not do either of these things. In any event, Hoover's privacy concern is not a defense to the collection action and it does not implicate admissibility of the documents.

required to grant motions that are nonmeritorious on their face just because the adverse party did not respond to the motion. The district court did not err.

D. Reply Brief

Hoover attempts to raise a number of new issues and concerns in his reply brief. This Court will not consider issues and arguments raised for the first time in the appellant's reply brief. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

E. Attorney Fees

As an additional issue on appeal, NCO requests attorney fees on appeal under I.C. § 12-120(3), which provides for attorney fees to the prevailing party in an action on an open account. *See Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 211, 61 P.3d 557, 568 (2002). NCO is the prevailing party in this appeal and is entitled to an award of fees pursuant to that statute.

III.

CONCLUSION

Summary judgment for NCO is affirmed. Costs and attorney fees to NCO.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**